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No. 04-723

Supreme Court, U.S.
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In The

# Supreme Court of the United States

STEVEDORING SERVICES OF AMERICA;
and HOMEPORT INSURANCE CO.,

*Petitioners,*

v.

AREL PRICE; Director, Office of Workers' Compensation Programs, U.S. DEPARTMENT OF LABOR,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEFS IN OPPOSITION

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners (collectively, "SSA") reply to the briefs filed by respondents Arel Price ("Price") and the Director, Office of Workers' Compensation Programs, U.S. Department of Labor ("the Director").

### 1. Introduction.

Price and the Director both urge denial of SSA's petition. The Director additionally restates the first question SSA presents for review, which concerns § 10(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 910(a). He urges the Court to give one of his arguments, concerning concurrent awards, "weight" under *Metropolitan Stevedore Co. v. Rambo* (*Rambo II*), 521 U.S. 121, 136 (1997), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

### 2. The "75 Percent Rule."

Price makes only two points that the Director does not also make. Neither is substantial. He first argues, in support of the Ninth Circuit's "75 percent rule" and the decision below, that the courts "must follow the plain language of the [LHWCA], even if it may be inequitable." (Price Resp. Br., 5-6) However, he contradicts himself. If as he argues (*Id.*, 2), Congress did *not* define the phrase "substantially the whole of the year" in § 910(a), he cannot argue that the "75 percent rule" is proper because it expresses the *plain language* of the statute.

Price also argues that SSA must take its arguments to Congress, because the courts cannot "legislate what the petitioners argue Congress should have done." (Price Resp. Br., 7) To the contrary, no separation-of-powers considerations preclude the courts from rejecting a judge-made, bright-line rule, created in 1998, that has no support in the statutory text or the Director's regulations, has never been considered by Congress, and was not forecast during 70 years of previous judicial construction. *Compare Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256, 272 (1979) ("Once Congress has relied upon conditions that the

courts have created, we are not as free as we would otherwise be to change them.").

The Director restates the first question presented in SSA's petition so he can argue that the uncontested finding that Price's longshore employment was not seasonal or intermittent is dispositive of the § 910(a) *versus* § 910(c) issue and, further, that the *only* other ground for utilizing § 910(c) when the "75 percent rule" is satisfied is insufficiency of evidence to make an accurate average weekly wage computation under § 910(a). (Fed. Resp. Br., i, 8) However, the Director fails to acknowledge that the Ninth Circuit broke with long-settled construction of the LHWCA when it announced the "75 percent rule" in *Matulic v. Director, OWCP*, 154 F.3d 1052 (CA9 1998), and adhered to it below (App. 11). Before *Matulic* was decided, an employer could argue that application of § 910(a) was not reasonable or fair on the facts of the given case, and that § 910(c) must apply instead, *even if* the claimant's employment was stable and continuous rather than seasonal or intermittent. (Pet., 16-17) Here, but for the application of the Ninth Circuit's rule, Price's case for using § 910(a) was negligible: he had limited himself to light work for years on account of previous injuries, his earnings had increased solely because of collectively bargained wage increases, his wage-earning capacity thus was no greater than his actual earnings of $1,156.15 per week, and he received collectively bargained vacation pay, holiday pay, and "guaranty" pay that gave him the benefit of wages for a full work year and a full work week. (*See* Pet., 4-6, 18-19) However, a single fact – he worked 75.77 percent of the 260 work days "available" to him – trumped all the others under the Ninth Circuit's rule.

Contrary to the Director's arguments, neither the language of § 910(a) nor administrative convenience supports that rule. SSA agrees with the Director that the statutory phrase, "*substantially* the whole of the year," may imply "some degree of overcompensation." A five-day worker need not work 260 days in a year, nor a six-day worker 300 days, for § 910(a) to apply. (*See* Fed. Resp. Br., 9) However, the Director improperly reads § 910(a) in isolation. Section 910 must be read and applied as a whole, in light of the LHWCA as a whole. (Pet., 10-11) *See*

*Koons Buick Pontiac GMC Inc. v. Nigh*, ___ U.S. ___, 125 S.Ct. 460, 466-67 (2004) ("Statutory construction is a 'holistic endeavor.'"), *quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

The Director argues that the "administrative convenience" of utilizing § 910(a) not only justifies "some level of overcompensation," it justifies a construction that precludes employers from arguing that application of § 910(a) may unreasonably and unfairly overcompensate a claimant. (Fed. Resp. Br., 9) However, in the case he cites, *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601 (CA 5 2004), the Fifth Circuit declined to adopt the Ninth Circuit's bright-line rule, basing its holding instead on the narrow legal ground that the administrative law judge had misapplied circuit precedent. 396 F.3d at 606. The footnote that the Director cites would not have been necessary if the Fifth Circuit had approved *Matulic*'s "75 percent rule."

Moreover, the Director offers no support for his assertion that it is easier to apply § 910(a) than § 910(c). (Fed. Resp. Br., 9) Here, Price's wages during the last year he worked, $60,119.97, were known. The § 910(a) and § 910(c) average weekly wage computations were both based on that figure; *see* Pet., 6. Actual pre-injury earnings are nearly always the starting point for LHWCA average weekly wage computations.

The Director next charges SSA with the burden of establishing that a "75 percent rule" is too onerous in light of "the customary hours worked in the industry," although he simultaneously suggests that the rule is just a "rule of thumb." (Fed. Resp. Br., 10) However, the Ninth Circuit has not established a "rule of thumb," it has established a bright-line rule. (App. 11) SSA's point is not that there should be a *different* bright-line rule, it is that there should be no such rule at all. Furthermore, the contrast between the "75 percent rule" and the rule this Court has adopted for Jones Act cases to guide determinations of the substantiality of a seaman's connection to a vessel is striking. In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court discussed "an appropriate rule of thumb for the ordinary case." As "no more than a guideline," the Court held that, "[A] worker who spends less than about 30 percent of his time in the service of

a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.* at 371.

By contrast, any flexibility in the "75 percent rule" is unidirectional: under it, benefits can only be *increased*. *See Matulic*, 154 F.3d at 1058.

Finally, the Director argues that the decision below conflicts neither with this Court's decision in *Rambo II* nor with the decisions of any other circuit. (Fed. Resp. Br., 10-12) He is wrong about *Rambo II* for two reasons. First, the statutory goal of accuracy in determining compensation, *see* 521 U.S. at 133, depends equally on accurate computation of an average weekly wage *and* accurate assessment of remaining wage-earning capacity, if any. Subsection 908(h), which was at issue in *Rambo II*, and § 910(c), which was not, include nearly identical language. Subsection 910(c) bases average weekly wage computations on a figure that "shall reasonably represent the annual earning capacity of the injured employee." Subsection 908(h) bases compensation for partial disability on "actual earnings if such actual earnings fairly and reasonably represent [the injured employee's] wage-earning capacity . . . ." Second, the Director's own directions to his agency contradict his argument. According to the *Longshore Procedure Manual*, accuracy is a concern in *every* average weekly wage determination:

> "The starting point in calculating the rate of compensation for disability or death is the injured employee's or deceased employee's average weekly wage. . . . *The overriding objective is to arrive at a valid earning capacity at the time of injury.*"

U.S. Department of Labor, Division of Longshore and Harbor Workers' Compensation, *Longshore Procedure Manual*, Chapter 3-200, Part 2.b (emphasis added).[1]

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[1] For the Longshore Procedure Manual, see:

http://www.dol.gov/esa/owcp/dlhwc/lspm/pmtoc.htm (last visited March 13, 2005).

The Director's manual deserves at least as much respect as the argument he briefs here. *Cf. Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The Director's argument that the decision below does not conflict with *Johnson v. Britton*, 110 U.S.App.D.C. 164, 290 F.2d 355, *cert. denied*, 368 U.S. 859 (1961), depends entirely on the fact that the claimant in *Johnson* worked 180 days before his injury – 69 percent of the available workdays. Price joins in, arguing that the Ninth Circuit would hold that § 910(c) applies on those facts. (Fed. Resp. Br., 10-11; Price Resp. Br., 3) However, the holding in *Johnson* was not based on application of a bright-line rule – there was none prior to *Matulic* and the decision below – and it is far from clear that the Ninth Circuit would use § 910(c) on the same facts. If Price had worked 180 days in the year preceding his injury, but could show that he ordinarily worked 197 days, the Ninth Circuit might well hold that § 910(a) must be used. *See Matulic*, 154 F.3d at 1058 ("We do not mean to suggest that a figure that is 75% or lower will necessarily result in the application of § 910(c).").

### 3. The Concurrent Awards Issue.

Price and the Director both deny that the decision below conflicts with decisions from any other judicial circuit, although they read a lead concurrent awards case differently. The Director additionally invokes *former* § 914(m), repealed in 1972, to support his reading of § 906(b)(1).

In the lead case, *Hastings v. Earth Satellite Corp.*, 202 U.S.App.D.C. 85, 628 F.2d 85, *cert. denied*, 449 U.S. 905 (1980), the claimant was earning an annual salary of $30,000 when he was disabled by a stroke caused by job stress. When he returned to part-time work for his employer, he received wages at the same rate as his previous salary, but they were prorated for the number of hours he actually worked: he earned only $9,228.80 during his last 12 months of work. He was forced to stop working entirely on account of pulmonary emboli and phlebitis caused by the sedentary nature of his part-time work. 202 U.S.App.D.C. at 86-87, 628 F.2d at 86-87. The administrative law judge awarded compensation for

temporary total and permanent partial disability resulting from the stroke, but he terminated the permanent partial award as of the commencement of the permanent total disability caused by the emboli. *Id.* at 87-88.

The Court of Appeals held that the administrative law judge improperly terminated the permanent partial award, offering a hypothetical case to demonstrate its point:

> "Consider a worker earning $10,000 per year. An accident permanently reduces his earning capacity to $6,000. He is awarded compensation based on the $4,000 diminution in his earning capacity. A second accident disables him totally. The second compensation award is based on the $6,000 in earning capacity remaining after the first accident. Terminating the first award at the onset of the second would deprive the worker of compensation for the permanent loss of $4,000 in earning capacity. Paying the two awards concurrently, however, compensates him fully. The sum of the two awards reflects the full $10,000 diminution in earning capacity."

*Id.* at 91.

Thus, the Court of Appeals understood clearly that the claimant's earnings had *declined* as a result of his first injury. To SSA's knowledge, neither the Benefits Review Board nor any judicial circuit rejects concurrent compensation awards on those facts. However, those are not the facts here.

Price, unlike the Director, recognizes that the *Hastings* Court's counterfactual discussion of the "anomaly" that would have resulted if the claimant's earnings had *increased* after his stroke was dictum. 202 U.S.App.D.C. at 96 n. 30, 628 F.2d at 96 n. 30. (*Compare* Price. Resp. Br., 12-13, *with* Fed. Resp. Br., 13, 17.) The Director not only fails to recognize the anomaly, he compounds his error by misreading the Court's later decision in *Crum v. General Adjustment Bureau*, 238 U.S.App.D.C. 80, 86, 738 F.2d 474, 480 (1984). The adjustment approved in *Crum* was necessary only because the claimant's earnings had *increased*, as the *Hastings* hypothetical shows.

The Ninth Circuit's failure to understand this point was fundamental. (App. 18-19) That error underlies its

mistaken refusal to read the definition of "disability," § 902(10), and § 906(b)(1), § 908(a), and § 908(c) "holistically" so as to give effect to Congress' clearly expressed intent that under the LHWCA, compensation for disability, even when total, replaces lost wage-earning capacity only in part.

The Director's defense of the Ninth Circuit's decision does not acknowledge that consideration, even in passing. However, this Court recognizes that the LHWCA is:

> " . . . a compromise between the competing interests of disabled laborers and their employers . . . a scheme for fair and efficient resolution of a class of private disputes, managed and arbitered by the Government . . . a quid pro quo *between employer and employee* [under which] [e]mployers relinquish certain legal rights which the law affords to them and so, in turn, do the employees."

*Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 131 (1995) (emphasis in original; internal quotation marks omitted); *accord Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 279 (1980).

Under § 908(c), compensation for permanent partial disability, whether scheduled or unscheduled, is *not* payable "in addition to" compensation for permanent total disability. Under § 908(a), compensation for permanent total disability is payable at the rate of two-thirds of the employee's average weekly wage, subject to the applicable maximum rate under § 906(b)(1). Those are real limits. The Ninth Circuit ignored them. The Director effectively asks this Court to permit the Ninth Circuit to alter the balance that Congress carefully struck.

When the LHWCA is understood and applied as Congress intended, it is evident that the reasons the Director and Price advance to distinguish the four total disability cases on which SSA relies (*see* Pet., 20) are immaterial. (Price Resp. Br., 10-11; Fed. Resp. Br., 14) In every case, the courts gave proper effect to the clear

statutory command of § 908(a) that compensation for permanent total disability may not be exceeded because under the LHWCA, disability cannot be greater than total.

The answer to the controlling question under *Hastings*, whether Price's combined permanent partial and permanent total awards exceed the compensation he would have been entitled to if a single injury had totally disabled him, is "yes." Contrary to the assertions of Price and the Director that he would have earned more, by 1998, but for his previous back injuries, that is not only unknowable, it puts SSA in the statutorily impermissible situation of being required to compensate him, not for two-thirds of the difference between his wage-earning capacity before and after his last day of work in 1998 as § 908(a) requires, but between what he *might have earned* and his remaining wage-earning capacity. (Price Resp. Br., 9, 11; Fed. Resp. Br., 13) Thus, the uncontested finding that Price's wage-earning capacity did not increase when he returned to work after his injury in 1979 fails as a matter of law to support the Ninth Circuit's reasoning. The decision below permits Price to be compensated for more wage-earning capacity than he has lost.

The Director argues that the Ninth Circuit correctly held, in addition, that Price's combined permanent partial and permanent total awards may properly exceed the maximum rate of § 906(b)(1), because that rate applies separately to each award. (Fed. Resp. Br., 16) The Director emphasizes the phrase, "the wages which the employee was earning *at the time of injury*," in the definition of "disability," § 902(10), arguing that Congress' focus is on the loss of wage-earning capacity "created by a particular injury." (*Id.*) To the contrary, the phrase that the Director emphasizes simply demonstrates Congress' recognition that "disability" may result from *multiple* injuries. Congress knows how to narrow the scope of that defined term. Thus, in § 908(f), which limits employers' liability in cases where a new injury increases a disabled worker's existing permanent disability, Congress provides that the employer shall pay compensation for "*such disability as is found to be attributable to that injury* based upon the average

weekly wages of the employee at the time of the injury" (emphasis added). If "disability" meant what the Director argues it means, Congress would have omitted the phrase "as is found to be attributable to that injury" from § 908(f).[2]

Finally, the Director argues that *former* § 914(m), which provided before it was amended in 1948 that, "The total compensation payable under this Act for injury or death shall in no event exceed the sum of $7,500," supports his reading of § 906(b)(1). (Fed. Resp. Br., 17) He relies on decisions holding that the § 914(m) limit applied separately to claims for disability and death benefits, *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664-65 (CA2), *cert. denied*, 304 U.S. 565 (1938), and to separate claims for permanent partial disability, *Pillsbury v. Liberty Mut. Ins. Co.*, 182 F.2d 743, 745 (CA9 1950). The difficulty with that argument is that maximum *dollar* limits differ qualitatively as well as quantitatively from maximum *weekly* limits. *See* 5 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 92.01 (2004) ("The three kinds of maximum limit that may give rise to questions in case of successive or concurrent injuries are maximum dollar limits on weekly benefits, maximum number of weeks allowable for certain injuries, and overall maximum dollar limits on benefits. There is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability."). Unlike claimants who were subject to *former* § 914(m), Price is not at risk of running out of benefits before his disability ends.

It is unfortunate that the Director chooses to rummage in history's attic for discarded LHWCA provisions when he ought to focus on the real damage the Ninth

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[2] The fact that the Director has advanced his § 906(b)(1) argument once before to the Benefits Review Board therefore adds little if anything to its "power to persuade." (Fed. Resp. Br., 17) *See Skidmore v. Swift & Co.*, 323 U.S. at 140.

Circuit's decision is likely to produce. The Court's "75 percent rule" improperly diminishes the intended scope of § 910(c) and unfairly augments the average weekly wage side of the LHWCA disability computation. The Court's refusal to read § 902(10), § 906(b)(1), § 908(a), and § 908(c) holistically in light of the overall statutory scheme compounds that error by improperly augmenting the compensation payable on the benefits side of the computation. It will not be difficult for claimants – or employers – to take advantage of the Ninth Circuit's innovations. Congress "eased the burden" on claimants of proving their claims by providing certain rebuttable presumptions in § 920, *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 280 (1994), and even without aid of presumptions, a prior LHWCA employer has only to prove a "minor but permanent increase in the extent of . . . disability" to shift the burden of providing benefits to a subsequent employer, *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse*, 339 F.3d 1102, 1105 (9th Cir. 2003), *cert. denied*, 125 S.Ct. 309 (2004). If the Ninth Circuit's decision stands, the result is likely to be as thorough and costly an end run around Congress' carefully balanced limits on employer liability as was once accomplished under this Court's congressionally-abrogated indemnity decisions in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). *Cf. Edmonds v. Compagnie Generale Transatl.*, 443 U.S. at 261-62.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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